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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Hearing:
July 10, 2001

Paper No. 71
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Haverly Systems, Inc.
v.
Omni Flow Computers, Inc.

Opposition No. 99,915
to application Serial No. 74/387,681
filed on May 6, 1993.

John Rannells of Baker & Friedman for Haverly Systems,
Inc.

Wayne Risoli of Chamberlain, Hrdlicka, White, Williams &
Martin, and Douglas Rommelmann and Gregory Hasley of
Akin, Gump, Strauss, Hauer & Feld, L.L.P. for Omni Flow
Computers, Inc.

Before Cissel, Rogers and Drost, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

Applicant filed the above-referenced application to
register the mark "OMNI" on the Principal Register for
what were subsequently identified by amendment as "flow
measurement and control computers featuring integrally
attached keypads for the measurement and control of

liquid hydrocarbon and gas flows," in Class 9; and for "printed matter, namely user manuals for measurement and control computers and controllers for use in the measurement and control of hydrocarbon liquid and gas flows," in Class 16. The basis for the application was applicant's claim of use of the mark on these products since December 7, 1990, and use of the mark on them in interstate commerce since May 2, 1991.

After the application was published for opposition, a Notice of Opposition was timely filed by Haverly Systems, Inc. As grounds for opposition, opposer alleged prior use and registration¹ of the same mark, "OMNI," for computer software, and that because the marks are identical and the goods are closely related, confusion is likely within the meaning of Section 2(d) of the Lanham Act. Applicant denied the essential allegations set forth in the Notice of Opposition.

A trial was conducted in accordance with the Trademark Rules of Practice, the parties filed briefs², and an oral hearing was conducted before the Board on the date indicated above.

¹ Reg. No. 1,691,194, covering "pre-recorded computer programs," issued on the Principal Register on June 9, 1992; affidavit under Sections 8 and 15 of the Act accepted and acknowledged.

² Opposer's reply brief was not considered because opposer failed to comply with Trademark Rule 2.128(b).

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The record created by the parties in this proceeding is substantial. It includes the transcripts (with exhibits) of four separate depositions of Larry Haverly, opposer's

founder and president; the transcripts (with exhibits) of two depositions of Dr. Michael Rappeport, a founder and partner in a New Jersey firm which does market research and marketing surveys; the transcript (with exhibits including a survey and its documentation) of the testimonial deposition of Dr. Gerald L. Ford, a market research expert who designed and caused to be conducted the survey for applicant with regard to the issue of likelihood of confusion presented by this case; and the transcript and exhibits from the testimonial deposition of Dr. Walter Murray, a Stanford University professor and a partner in a firm which specializes in consulting with regard to optimization, particularly non-linear optimization, in such fields as oil refining³. Opposer filed ten Notices of Reliance⁴, thereby making of record opposer's pleaded registration; opposer's Registration No. 1,506,920 for "OMNI PC/FE" for business computer software programs; applicant's responses to a great many of opposer's requests for admissions and interrogatories; and a number of excerpts from various publications.

³ Opposer objected to Dr. Murray's testimony, alleging that he is not an expert in products of the type involved in this proceeding. Opposer's objection is overruled. We have considered this testimony in view of Dr. Murray's expertise in optimization and operations research.

⁴ The tenth Notice of Reliance was stricken by the Board on July 10, 2000.

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The issues before us in this proceeding are priority

and likelihood of confusion. Opposer, as plaintiff, had the burden of establishing that it has priority and that confusion is likely as a result of applicant's use of the mark it seeks to register in connection with the goods set forth in the application. *Fossil, Inc. v. Fossil Group*, 49 USPQ2d 1452 (TTAB 1998).

After careful consideration of this record, the arguments of the parties and the relevant legal precedent, we conclude that although opposer clearly has established that it has priority over applicant with respect to the use of the mark "OMNI" and that it registered the mark prior to when applicant applied to register it, opposer has not met its burden of proving that either the software for which it uses its mark, or the software encompassed within the registration for the mark is related so closely to the products specified in the opposed application that the use of "OMNI" as the trademark on the goods of both parties is likely to cause confusion, mistake or deception.

In the case of *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), the predecessor to our primary reviewing court set out the factors to be considered in determining whether confusion is likely.

Chief among these factors are the similarity of the marks and the similarity of the goods set forth in the application and any involved registration, respectively. In the instant case, the marks are the same, so we must direct our attention to the remaining factors listed by the Court in the DuPont case.

Dr. Ford's survey is the centerpiece of applicant's argument that confusion is not likely, and conversely, it is the principal focus of much of opposer's testimony and argument that confusion is likely. Dr. Ford surveyed individuals in refineries who are responsible for making decisions or recommendations regarding the purchase of devices for metering the flow of liquids and gases. Applicant contends that the survey shows that confusion is not likely because none of the survey respondents named opposer when they were shown the mark "OMNI" and asked what is the source of "flow measurement and control computers for the measurement and control of liquid hydrocarbon and gas flows" bearing the "OMNI" trademark. Applicant argues that its position is further bolstered by the fact that when respondents were asked to name other products they would expect to come from the same source as "OMNI" flow measurement and control computers,

none of the respondents named the type of products
opposer makes.

Opposer, on the other hand, contends that the survey is not probative on the issue of whether confusion is likely because the respondents were selected from the wrong statistical universe. This argument is based on distinctions opposer draws between "devices for metering the flow of liquids and gases," which is the language used to qualify respondents to take part in this survey, and "flow measurement and control computers for the measurement and control of liquid hydrocarbon and gas flows," which is the precise wording used in the application to identify applicant's products. Opposer argues that by surveying the prospective purchasers of "devices for metering the flow of liquids and gases," applicant made its inquiries to the wrong people.

Opposer goes on to argue that if the survey does show anything, it shows that the relevant purchasers in the refinery business expect software and computer hardware sold under one mark to come from one source and therefore that confusion is likely in the case at hand because purchasers would expect applicant's computers and opposer's software, both sold under the same mark, to be the products of a single business entity. Opposer points

to the fact that the majority of respondents, when asked who they thought was the source of "OMNI" flow measurement and control computers, answered simply, "OMNI." Opposer interprets this as a reference to opposer, rather than applicant, in view of the fact that "OMNI" is opposer's primary trademark.

We have considered the testimony of Dr. Ford, Dr. Murray and Dr. Rappeport in determining what effect to give applicant's survey, but we cannot adopt completely the position of either party. We cannot conclude that the survey establishes either that confusion is likely, or that it is not likely. We are not persuaded that the survey universe was inappropriate, in that the actual products with which applicant uses the mark it seeks to register, "flow measurement and control computers featuring integrally attached keypads for the measurement and control of liquid hydrocarbons and gas flows," would appear to be a subset of the broader category of "devices for metering the flow of liquids or gases," which was the language used to qualify the survey respondents. In other words, the people who purchase devices for metering the flow of liquids and gases are the same people who purchase flow measurement and control computers.

Nonetheless, these respondents were shown the mark applicant seeks to register and shown the identification-of-goods clause from the application, and then they were asked who puts out the identified products under the mark "OMNI." No respondent named opposer, and very few named applicant. The majority, over half, simply responded with the word "OMNI." Notwithstanding Dr. Ford's contentions to the contrary, we agree with opposer that in view of the fact that opposer's primary mark is "OMNI," these responses could very well have been references to opposer. For that matter, they just as well could have been references to applicant, the actual source of "OMNI" for flow measurement and control computers for measuring and controlling liquids and gases which have been sold in the refinery industry. We simply do not have a sufficient basis upon which to determine to whom these respondents were referring when they used the word "OMNI."

The record shows that opposer has used the mark "OMNI" on specialized computer programs since well before applicant went into business. Such software is used in a variety of industries, including the petroleum, refining, chemical and pipeline industries. The software can be used to create a model of a particular refinery. Such a

model is then made the subject of maximization programming, which considers all the possible ways of running that particular refinery and provides the refinery managers with data and reports which allow them to make the most of the available options with respect to the use of raw materials, production facilities, transportation and scheduling. The goal, of course, is to maximize profits. The purchasers and users of opposer's software are the management officials who are in charge of the refinery's overall operation. They are the ones who need to know how best to utilize their manufacturing facilities and the materials available to them in ways that maximize the profit that their plants can generate.

As noted above, however, opposer's registration, properly made of record, incorporates the broad terminology "pre-recorded computer programs." Thus, our analysis of the issue of whether confusion is likely is based on this broad identification of goods as set forth in the pleaded registration, not merely on opposer's proof of prior common law rights derived from prior use of the mark in connection with the specific optimization software discussed above. Our reviewing court has made it clear that we are to resolve the issue of likelihood

of confusion in view of the unrestricted identification of goods in the registration, presuming that they travel in all the usual trade channels for such goods and to all the customary classes of purchasers of them. *Cunningham v. Laser Golf Corp.*, 55 USPQ2d 1846 (Fed. Cir. 2000).

("Proceedings before the Board are concerned with registrability and not use of the mark. Accordingly, the identification of goods/services statement in the registration, not the goods/services actually used by the registrant, frames the issue.") Nonetheless, opposer had the burden of showing what its "pre-recorded computer programs" are, the "established, likely-to-continue trade channels" for its programs, and that these are related to the products applicant markets under the same mark. Opposer did not establish this, however. Instead, the evidence and testimony of record in this proceeding shows no identity in the usual channels of trade or customary purchasers for applicant's products and the goods identified in opposer's pleaded registration.

Although the products sold under the "OMNI" mark by applicant are technically computers, in the sense that they are digitally operated and controlled machines that do incorporate microchips and can be programmed, applicant's goods are used for the very limited and

specialized purpose of monitoring and controlling the flow of liquids and gases through pipes. As applicant puts it, its flow measurement and control computers may be thought of as cash registers, used at various points along pipelines where custody of the materials moving through the lines changes hands, in order to quantify and make records of such transfers as they occur.

Applicant's products sold under the mark "OMNI" do not appear to be more than very sophisticated digital meters and valve controls that can record, report and store the information they generate. Applicant's devices make continuous and instantaneous real-time measurements for the purpose of controlling and documenting the transfer of custody of liquids and gases. There is no evidence establishing that channels of trade and classes of customers for such goods are the same as for opposer's software.

The record shows that the goods of the parties are expensive, technically complex products bought and used by technically sophisticated professionals. It does not, however, support the conclusion that applicant's products are purchased or used by the same people in refineries who purchase and use opposer's modeling software for optimization of the overall refinery activities and

profits, or any software opposer may market. In a similar sense, the record does not support opposer's claim that the data applicant's flow computers generate is used in conjunction with any programs of opposer. There is no evidence of anyone ever using the parties' products together, nor is there any evidence of these goods being promoted together.

It is particularly telling that we have no evidence that they have ever been purchased by the same individual within a particular refining business. Mr. Haverly did not even know if his company's software could be run on applicant's flow computers. None of the other testimony or evidence indicates that it can. Although the lack of evidence of any incidents of actual confusion is not determinative of the issue of whether confusion is likely, we are not surprised that there is no testimony or evidence in this record that any actual confusion has ever occurred.

It is well settled that even though a single large business entity may purchase two particular products, this does not necessarily establish that such goods move in the same channels of trade or that there is an overlap in customers. *Electronic Design & Sales, Inc. v.*

Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992).

Simply put, confusion is unlikely in the case at hand because even though the applicant and opposer use the same mark and the goods of both parties are sold to refining companies, the record does not establish that the technically sophisticated professionals who use or make the purchasing decisions with respect to applicant's products are the same technically sophisticated professionals who use or make the decisions to purchase opposer's products. We cannot identify who would be likely to be confused by applicant's mark, nor can we determine why they would be confused in view of the fundamental differences between applicant's computers for the measurement and control of the flow of liquid hydrocarbon and gas flows, on the one hand, and opposer's software, on the other. There is no evidence that a single source supplies both flow measurement and control computers like the ones applicant sells and software like that sold by opposer, much less that one entity does this under a single trademark.

In addition to failing to meet its burden with respect to proving the relatedness of its goods to those of applicant's flow measurement and control computers,

opposer has also plainly not met its burden of establishing the relatedness of its goods to the printed user manuals for flow measurement and control computers. In fact, opposer presented neither evidence nor arguments on this issue. Under these circumstances, the opposition must fail as to the goods in Class 16 as well.

In summary, opposer has failed to meet its burden of proving that its goods are related in such a way to those specified in the opposed application that the use of the same trademark on both is likely to cause confusion, mistake or deception. While our primary reviewing court stated in *J & J Snack Foods v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ 1889 (Fed. Cir. 1991), that doubts with regard to whether confusion is likely must be resolved in favor of the opposer if it is the prior user, in the instant case, we have no doubt that confusion is unlikely. As noted above, the record simply does not establish that there is anyone who is likely to be confused, or, for that matter, what basis anyone would have for assuming that the goods specified in the opposed application emanate from the same source as software of the type opposer markets.

DECISION: The opposition is dismissed.